No. 12796

In the United States Court of Appeals for the Ninth Circuit

BORK MANUFACTURING CO., INC., A CORPORATION, AND ALVIN BORKIN, AN INDIVIDUAL AND PRESIDENT OF BORK MANUFACTURING CO., INC., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

I. STATEMENT OF THE CASE

This is an administrative law proceeding arising upon petition to review and set aside order to cease and desist issued by the Federal Trade Commission, respondent, pursuant to a Commission complaint charging petitioners with engaging in unfair acts and practices in commerce in violation of the Federal Trade Commission Act.[1]

[1] The pertinent provisions of the Statute are as follows:

"SEC. 5. (a) Unfair Methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships or corporations * * * from using un-

The complaint, issued on the 9th day of January, 1948, alleged (Tr. R. p. 3–6) that Bork Manufacturing Co., Inc., a corporation (hereinafter referred to as "Bork"), and Alvin Borkin, an individual and President of "Bork", petitioners, with their principal office located at 6201 Fifteenth Avenue, Brooklyn, N. Y., were engaged in the manufacture, and in the sale and distribution in interstate commerce, of various types of punch boards and push cards—some containing instructions or legends printed thereon, others with blank space provided for such printed matter—all so prepared and arranged that the only use to be made thereof and the only manner in which they are used is in selling merchandise to the ultimate purchaser by means of lot or chance; that petitioners sell their push cards and punch boards to manufacturers of, and dealers in, various articles of merchandise in interstate commerce.

The complaint further alleged (Tr. R. pp. 6–7) that many persons, firms and corporations who distribute merchandise in interests commerce and in the District of Columbia purchase petitioners' push cards and punch boards and assemble assortments of merchandise with said push cards and punch boards; that retail dealers have purchased such assortments and exposed the same to the purchasing public and have sold such merchandise by means of said push cards and punch boards; that because of the element of chance involved, many members of the purchasing

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fair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 52 Stat. 111–112; 15 U. S. C. 45 (a).

public have been induced to buy from such retail dealers who use petitioners' push cards and punch boards to sell their merchandise and as a result many retail dealers have been induced to deal or trade with manufacturers, wholesale dealers and jobbers who distribute the push cards and punch boards with their merchandise.

The complaint further alleged (Tr. R. p. 7) that the sale of merchandise to the public by the use of push cards and punch boards involves a game of chance or the sale of a chance to procure merchandise at less than normal retail prices; that the sale of merchandise by this manner and means teaches and encourages gambling among members of the public all to the injury of the public; that sale of merchandise by chance or lottery is a practice which is contrary to an established public policy of the Government of the United States and in violation of criminal laws and constitutes an unfair act and practice in commerce.

The complaint further alleged (Tr. R. pp. 7–8) that by the sale of their push cards and punch boards petitioners supply and place in the hands of others the means of conducting lotteries, games of chance or gift enterprise in the sale or distribution of merchandise, thus providing others with the means of, and instrumentalities for, engaging in unfair acts and practices in violation of the Federal Trade Commission Act.

On the basis of the above allegations the complaint charged (Tr. R. p. 8) that the acts and practices of petitioners were all to the injury of the public and

constitute unfair acts and practices in commerce in violation of the Federal Trade Commission Act. In their answer filed on the 30th day of January 1948, signed by their then attorneys, petitioners denied all material allegations of the complaint. However, at the initial hearing held on the 23d day of September 1948, petitioners through their counsel requested permission to withdraw their original answer and file in lieu thereof a substitute answer in which all the material allegations of facts alleged in the complaint were admitted, denying, however, that such facts constituted a violation of the Federal Trade Commission Act. On March 14, 1950, the Trial Examiner closed the hearings and transmitted to the Commission the undated admission answer of petitioners.

Thereafter on the 24th day of October 1950, the Commission made its findings as to the facts (Tr. R. pp. 17–22), which accorded with the allegations of the complaint as above outlined and as admitted by petitioners, concluded (Tr. R. pp. 22–23) that petitioners' acts and practices were "all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act" and entered its order (Tr. R. pp. 23–25) to cease and desist.

There is no dispute as to the facts found by the Commission. Petitioners' sole contention here is that such facts do not violate the Federal Trade Commission Act. The facts as found by the Commission are substantially, if not exactly, those alleged in the complaint—a brief summary of which we have set forth

herein above (*supra,* pp. 2–3). Upon the basis of the admitted facts and upon the conclusion arrived at by the Commission from those admitted facts, the Commission entered its order (Tr. R. pp. 23–25), directing Bork Manufacturing Co., Inc., its officers, agents, representatives, and employees, and Alvin Borkin, individually and as an officer of "Bork", his agents, representatives and employees, to cease and desist from:

> Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, punch boards, push cards or other lottery devices which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

Petitioners thereafter filed their petition to review and set aside the Commission's order (Tr. R. pp. 32–35), and filed a statement of eight points relied upon (Tr. R. p. 36). The alleged points not developed or argued in their brief may be deemed abandoned. *Donnelley* v. *United States,* 276 U. S. 505, 511 (1928); *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U. S. 359, 369 (1927).

II. THE CONTESTED ISSUES

The attorneys for petitioners in the instant matter are also attorneys for petitioners in the *Lichtenstein* case, No. 12666, now pending in this court, and in their brief here they have developed their argument almost indentical with their brief in the *Lichtenstein* case, stating the same question presented and the assignment of the same errors, developing their argu-

ment under the following headings—unnumbered as in the *Lichtenstein* brief but also, in some instances, not even set out in bold type as in the *Lichtenstein* brief: (1) "the rule of strict construction must be applied to the Federal Trade Commission Act" (Pet.'s br. p. 8); (2) "under what principle of law is the Commission proceeding" (Pet.'s br. p. 9); (3) "that petitioners' acts are not unfair methods of competition and not unfair acts within the meaning of the Federal Trade Commission Act" (br. pp. 11–15); (4) "petitioners are not using any acts, methods, or practices" (Pet.'s br. pp. 15–31); (5) "the order is too broad" (Pet.'s br. pp. 10–11, 31); (6) "this proceeding is not in respect thereof to the interest of the public" (Pet.'s br. pp. 31–37).

Unlike the *Lichtenstein* case—No. 12666—petitioners in the instant matter admitted all of the material allegations of the complaint. Petitioners admitted that they were engaged in the sale of punch boards and push cards in interstate commerce; admitted that such punch boards and push cards were designed and sold for the sole purpose of enabling others to sell merchandise to the public by means of gift enterprise, game of chance or lottery. Petitioners' sole contention here therefore is: admitting the facts as found by the Commission such facts do not constitute a violation of the Federal Trade Commission Act and, therefore, the Federal Trade Commission is without jurisdiction to issue the order here involved. We, therefore, believe that for simplicity, clarity and conciseness the question presented can be stated as follows:

(1) Whether the Federal Trade Commission has jurisdiction to prohibit the sale and distribution in interstate commerce of punch boards and push cards designed and sold for the purpose of enabling others to sell merchandise to the public by means of a game of chance, gift enterprise or lottery.

III. ARGUMENT

Preliminary statement

Although a large portion of petitioners' brief and the citations of authorities have to do with the question of unfair methods of competition and deceptive acts and practices, those questions are not here involved. The Commission did not charge nor did it find that, in the sale and distribution of punch boards and push cards in interstate commerce, petitioners were engaged either in unfair methods of competition or deceptive acts and practices. The *finding* was that petitioners *were engaged in unfair acts and practices in interstate commerce in violation of the Federal Trade Commission Act.* Petitioners' argument here, just as in the Lichtenstein brief, is a confusing mixture of irrelevant matter, academic discussions and "illogical syllogistical" reasoning and in many instances a distortion of applicable principles of law.

Relying on *Federal Trade Commission* v. *Raladam,* 283 U. S. 643 (1931); *Federal Trade Commission* v. *Klesner,* 280 U. S. 19 (1929) and *Federal Trade Commission* v. *Bunte Bros.,* 312 U. S. 349 (1941), petitioners contend that the scope of the authority of the Federal Trade Commission is strictly limited and that the rule of strict construction must be applied

to the Federal Trade Commission Act (br. p. 8); petitioners state that in the face of the Supreme Court decision in the *Bunte* case—where the court held that the Federal Trade Commission had no jurisdiction over intrastate transactions—they cannot comprehend what theory or principle of law the Commission is relying upon to sustain its jurisdiction to issue an order as broad as the instant order (Pet.'s br. pp. 9–11). Petitioners then discuss the meaning of the word "unfair" and upon the basis of the decision of the court in the *Raladam* case arrive at the conclusion that their methods and practices are not unfair to competitors, to purchasers or to both; that the decision in the *Raladam* case limits the meaning of the word "unfair" to methods, acts or practices either unfair to competitors, to purchaser or to both (br. pp. 11–14).

Having thus relied on the *Raladam* case petitioners then do a strange thing, they cite *Pap Boys—Manny, Moe & Jack, Inc.* v. *Federal Trade Commission,* 122 F. 2d 158 (C. A. 3, 1941), to show that the rule laid down in the *Raladam* case is *no longer applicable*—and therefore their methods, acts and practices are neither unfair to competitors nor purchasers (br. pp. 14–15).

Petitioners next engage in some grammatical gymnastic contortions that would strain the reasoning powers of the most ardent semantic and come up with the conclusion that if the word "in" as used in the Federal Trade Commission Act means only "in" and not something else; then, obviously, the word "using" as it appears in the Federal Trade Commission Act

must of necessity mean only "using." Based upon this remarkable conclusion and relying upon this court's decision in *California Rice Industries* v. *Federal Trade Commission,* 102 F. 2d 716 (C. A. 9, 1939), and the Supreme Court's decision in the *Bunte* case, petitioners assert that they do not use any method, act or practice in interstate commerce—a startling assertion to say the least (br. pp. 15–16).

Petitioners then attempt to analyze *Scientific Manufacturing Co., Inc. et al.* v. *Federal Trade Commission,* 124 F. 2d 640 (C. A. 3, 1941) and *Chas. A. Brewer & Sons* v. *Federal Trade Commission,* 158 F. 2d 74 (C. A. 6, 1946), in an effort to demonstrate that their acts and practices are not unfair and deceptive "in respect of the petitioners' trade in interstate commerce" (br. pp. 16–31)—weaving into the confused pattern of their argument a discussion of *Federal Trade Commission* v. *Winsted Hosiery Company,* 258 U. S. 483 (1922), (br. pp. 21–26); a discussion of the cases cited by the courts in the opinions in the *Winsted* case (br. p. 25) and in the *Brewer* case (br. pp. 25–27, 30); an attempted analysis of *Modernistic Candies, Inc. et ed.* v. *Federal Trade Commission,* 145 F. 2d 454 (C. A. 7, 1944)—all of which but adds further confusion to petitioners' argument. Petitioners then emerge with the final conclusion (br. pp. 30–31) that: the decisions in the *Modernistic* and the *Brewer* cases are unsound—those should have been decided differently; since intrastate transactions are not in the purview of the Federal Trade Commission, the proceeding in the instant matter is controlled by the decision of the Supreme Court in the *Bunte* case; the

Winsted case is of no importance to the resolving of the issues here; and they hope to convince the court that their contention is correct, the Sixth Circuit Court of Appeals' decision in the *Brewer* case is wrong, and this court should not follow that decision.

Petitioners' entire brief here, like petitioners' brief in the *Lichtenstein* case, begs the question, ignores the admitted facts, and confuses the applicable principles of law. We, therefore, do not believe it would serve any useful purpose if we attempted to answer in detail each of the many varied patterns, related or otherwise, of petitioners' argument. We shall, therefore, confine ourselves to the one question presented and, since the facts are admitted by petitioners, of a discussion of the applicable law.

Petitioners' argument ignores two basic fundamental principles firmly established in cases involving the sale and distribution of goods by the means of game of chance, gift enterprise, or lottery scheme. They are:

(1) The sale of goods by a plan or method which involves the use of a game of chance, gift enterprise, or lottery is a practice which is contrary to an established policy of the Government of the United States and is an unfair method of competition and an unfair act and practice in violation of the Federal Trade Commission Act; and

(2) Supplying to or placing in the hands of others the means or methods of conducting a game of chance, gift enterprise, or lottery in the sale and distribution of merchandise is an unfair method of competition

nd an unfair act and practice in violation of the ederal Trade Commission Act.

The court should, therefore, bear in mind that petiioners admit that they sell and distribute in interstate ommerce punch boards and push cards designed and sed for no other purpose than that of selling merandise by means of a game of chance, gift enterprise c lottery. Petitioners, therefore, admit that they violate the Federal Trade Commission Act. This should be a complete and sufficient reply to their argument.

To avoid repeating citations to certain fundamental ules of law, which are applicable throughout this brief, we remind the court in the beginning of the following principles:

The validity of the Commission's order is settled b many authorities.

> *Lee Boyer's Candy* v. *Federal Trade Commission,* 128 F. 2d 261 (C. A. 9, 1942); *Helen Ardelle* v. *Federal Trade Commission,* 101 F. 2d 718, 719 (C. A. 9, 1939); *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483 (1922); *Federal Trade Commission* v. *Keppel & Brother, Inc.,* 291 U. S. 304 (1934); *Chas. A. Brewer & Sons* v. *Federal Trade Commission,* 158 F. 2d 74 (C. A. 6, 1946); *Modernistic Candies, Inc.* v. *Federal Trade Commission,* 145 F. 2d 454 (C. A. 7, 1944); *Deer* v. *Federal Trade Commission,* 152 F. 2d 65 (C. A. 2, 1945); *National Candy Co.* v. *Federal Trade Commission,* 104 F. 2d 999 (C. A. 7, 1939), cert. den. 308 U. S. 610 (1939); *Jaffe* v. *Federal Trade Commission,* 139 F. 2d 112 (C. A. 7,

1943), cert. den. 321 U. S. 791 (1944) and scores of others.

Such progression as there has been in the remedy embodied in the Commission's orders against lottery methods has resulted from evasion by practitioners of these methods; and was of a type anticipated when the Act was passed.

Federal Trade Commission v. *Beech-Nut Packing Company,* 257 U. S. 441, 453 (1922); *National Candy Co.* v. *Federal Trade Commission,* 104 F. 2d 999, 1005 (C. A. 7th, 1939), cert. den. 308 U. S. 610 (1939); *Wolf* v. *Federal Trade Commission,* 135 F. 2d 564, 566–567 (C. A. 7th, 1943).

Commerce in facilities for conducting local lotteries is within the Commission's jurisdiction.

Federal Trade Commission v. *Keppel & Brothers, Inc.,* 291 U. S. 304, 313 (1934); *Chas. A. Brewer & Sons* v. *Federal Trade Commission,* 158 F. 2d 74 (C. A. 6, 1946); *Modernistic Candies, Inc.* v. *Federal Trade Commission,* 145, F. 2d 454, 455 (C. A. 7, 1944); *Deer* v. *Federal Trade Commission,* 152 F. 2d 65, 66 (C. A. 2, 1945); *Federal Trade Commission* v. *Martoccio Co.,* 87 F. 2d 561, 564 (C. A. 8th, 1937), cert. den. 301 U. S. 691, (1937); *Maltz* v. *Sax,* 134 F. 2d 2, 5 (C. A. 7th, 1943), cert. den. 319 U. S. 772 (1943); *Chicago Silk Co.* v. *Federal Trade Commission,* 90 F. 2d 689, 691 (C. A. 7th, 1937), cert. den. 302 U. S. 753 (1937).

Powers granted to the Commission include that of eliminating lottery methods in commerce.

Federal Trade Commission v. *Keppel & Brother,* 291 U. S. 304 (1934); *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258, U. S. 483, 493 (1922); *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495 (1935); *Federal Trade Commission* v. *Algoma Lumber Co.,* 291 U. S. 67, 81 (1934).

Indeed the situation is such that Congress must be presumed to have had notice of the construction placed by the Commission and the courts upon the Federal Trade Commission Act as respects lottery methods and have acquiesced in and approved that construction.

Norwegian Nitrogen Products Co. v. *United States,* 288 U. S. 294, 313 (1933); *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492–493 (1931); *Alaska Steamship Co.* v. *United States,* 290 U. S. 256, 262 (1933); *Nagle* v. *Loi Hoa,* 275 U. S. 475, 481–482 (1928); *United States* v. *Hermanos,* 209 U. S. 337, 339 (1908).

If Congress were deemed to have refrained from declaring such public policy in sufficiently broad terms, the Supreme Court had the power to declare the public policy.

United States v. *Trans-Missouri Freight Association,* 166 U. S. 290, 340 (1897); *St. Louis Mining Co.* v. *Montana Mining Co.,* 171 U. S. 650, 655 (1898); *Zeigler* v. *Illinois Trust and Savings Bank,* 245 Ill. 180, 91 N. E. 1041, 1045 (1910); *Maltz* v. *Sax,* 134 F. 2d 2 (C. C. A. 7th, 1943), cert. den. 319 U. S. 772 (1943).

The national public policy against lotteries has long been recognized by the Supreme Court.

Phalen v. *Virginia,* 49 U. S. 163 (1850); *Stone* v. *Mississippi,* 101 U. S. 814 (1879); *Federal Trade Commission* v. *Keppel & Brother,* 291 U. S. 304 (1934).

The *Keppel* case is a precedent as to the public policy authoritative herein.

Jaffe v. *Federal Trade Commission,* 139 F. 2d 112 (C. C. A. 7th, 1943), cert. den. March 27, 1944, 321 U. S. 791; *National Candy Co.* v. *Federal Trade Commission,* 104, F. 2d 999 (C. C. A. 7th, 1939), cert. den. 308 U. S. 610 (1939); *Wolf* v. *Federal Trade Commission,* 135 F. 2d 564 (C. C. A. 7th, 1943).

The remedy embodied in the order accords with law and is within the discretion granted to the Commission.

Jaffe v. *Federal Trade Commission,* 139 F. 2d 112 (C. C. A. 7th, 1943), cert. den. 321 U. S. 791 (1944); *Federal Communications Commission* v. *Pottsville Broadcasting Company,* 309 U. S. 134 (1940); *Herzfeld* v. *Federal Trade Commission,* 140 F. 2d 207, 208–209 (C. A. 2d, 1944); *Chas. A. Brewer & Sons* v. *Federal Trade Commission,* 158 F. 2d 74 (C. A. 6, 1946); *Deer* v. *Federal Trade Commission,* 152 F. 2d 65, 66 (C. A. 2, 1945); *Modernistic Candies, Inc.* v. *Federal Trade Commission,* 145 F. 2d 454, 455 (C. A. 7, 1944).

The Commission is the trier of the facts and its findings, supported by substantial evidence, are conclusive. *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112, 117 (1937); *Federal Trade Commission* v. *Algoma Lumber Company,* 291

U. S. 67, 73 (1934); *Federal Trade Commission* v. *Pacific States Paper Trade Association,* 273 U. S. 52, 63 (1927).

The Commission's findings are presumed to be supported by substantial evidence, *Federal Trade Commission* v. *A. McLean & Son,* 84 F. 2d 910, 911 (C. A. 7, 1936).

The weight to be given to the evidence as well as the inference reasonably to be drawn therefrom is for the Commission to determine. *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726 (1945); *Federal Trade Commission* v. *A. E. Staley Mfg. Co.,* 324 U. S. 746 (1945); *Modern Marketing Service* v. *Federal Trade Commission,* 149 F. 2d 970, 973 (C. A. 7, 1945); and the "possibility of drawing either of two inconsistent inferences from the evidence" does not prevent the Commission from drawing one of them. *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.,* 316 U. S. 105, 106 (1942); *Phelps-Dodge Refining Corp.* v. *Federal Trade Commission,* 130 F. 2d 393, 395 (C. A. 2, 1943).

The Commission's findings are to be construed liberally in support of the order to cease and desist. *Allied Paper Mills* v. *Federal Trade Commission,* 168 F. 2d 600, 606 (C. A. 7, 1948), cert. den. 336 U. S. 918 (1949); *Triangle Conduit and Cable Company* v. *Federal Trade Commission,* 168 F. 2d 175, 179 (C. A. 7, 1948), aff'd, 336 U. S. 949, 956; *Rank* v. *Kuhn,* 263 Ia. 854, 20 N. W. 2d 72, and wherever from facts found other facts may be inferred which will support the order, such inferences will be deemed to have

been drawn. *Clyde Equipment Corp.* v. *Fiorito,* 16 F. 2d 106, 107 (C. A. 9, 1926).

Inferences may be drawn from obvious facts not of record. *Philadelphia Co.* v. *Securities and Exchange Commission,* 85 App. D. C. 327, 331; 177 F. 2d 720, 724 (1949).

The sale of merchandise by the use of games of chance, gift enterprises or lotteries is a practice "of the sort which the Common Law and Criminal Statutes have long deemed contrary to public policy", *Federal Trade Commission* v. *R. F. Keppel & Bro. Inc.,* 291 U. S. 304, 313 (1934); and to say that the sale of goods in interstate commerce by means of such practices is not "unfair" would be a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction. See *Federal Trade Commission* v. *Royal Milling Co.,* 288 U. S. 212, 217; *Federal Trade Commission* v. *Algoma Lumber Co.* (*supra*) at 81.

While it is for the courts to determine what practices or methods of competition are to be deemed unfair, in passing on that question the determination of the Commission is of weight. The Commission was created with the avowed purpose of lodging the administrative functions committed to it in "a body especially competent to deal with them by reason of information, experience, and careful study of the business and economic conditions of the industry affected" and it was organized so as to give to its members the opportunity to acquire the expertness in dealing with those special questions concerning in-

dustry that comes from experience. See *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441, 453 (1922).

It may assist the court if we first give some indication of the great body of judicial opinion which supports the Commission's actions in this matter and justifies the Commission's order.

A. The order of the Commission herein is supported by a great array of judicial precedents

We submit that the doctrines governing the Commission's order and calling for affirmance thereof are identical with doctrines laid down in lottery cases by the Supreme Court of the United States and by almost all of the Circuits. The following cases decided by the Supreme Court and by the various courts, all affirming orders of the Commission directing the discontinuance of lottery practices, we regard as clearly controlling:

> *Federal Trade Commission* v. *Keppel & Brother,* 291 U. S. 304 (1934); *Walter H. Johnson Candy Co.* v. *Federal Trade Commission,* 78 F. 2d 717 (C. A. 7th, 1935); *Lee Boyer's Candy* v. *Federal Trade Commission,* 128 F. 2d 261 (C. A. 9, 1942); *Helen Ardelle* v. *Federal Trade Commission,* 101 F. 2d 718, 719 (C. A. 9, 1939); *Deer* v. *Federal Trade Commission,* 152 F. 2d 65 (C. A. 2, 1945); *Loughran* v. *Federal Trade Commission,* 143 F. 2d 431, 434 (C. A. 8, 1944); *Wolf* v. *Federal Trade Commission,* 135 F. 2d 564, 568 (C. A. 7, 1943); *Koolish* v. *Federal Trade Commission,* 129 F. 2d 64, 65 (C. A. 7, 1942), cert. den. 317 U. S. 683 (1942);

Hill v. *Federal Trade Commission,* 124 F. 2d 104, 106 (C. A. 5, 1941); *Ostler Candy Co.* v. *Federal Trade Commission,* 106 F. 2d 962, 965 (C. A. 10, 1939), cert. den. 309 U. S. 675 (1940); *Minter* v. *Federal Trade Commission,* 102 F. 2d 69, 70 (C. A. 3, 1939); *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483, 494 (1922); *Perloff* v. *Federal Trade Commission,* 150 F. 2d 757, 759–760 (C. A. 3, 1945); *Chas. A. Brewer & Sons* v. *Federal Trade Commission,* 158 F. 2d 74 (C. A. 6, 1946); *Modernistic Candies, Inc.* v. *Federal Trade Commission,* 145 F. 2d 454, 455 (C. A. 7, 1944); *Jaffe* v. *Federal Trade Commission,* 139 F. 2d 112 (C. A. 7, 1943), cert. den. 321 U. S. 791 (1944); *Chicago Silk Co.* v. *Federal Trade Commission,* 90 F. 2d 689, 691 (C. A. 7, 1937); *Federal Trade Commission* v. *F. A. Martoccio Co.,* 87 F. 2d 561, 565 (C. A. 8, 1937), cert. den. 301 U. S. 691 (1937)).

In the first above-named case the Supreme Court pointed out that the lottery practice engaged in by Keppel & Bro., Inc., was "carried on by 40 or more manufacturers" and remarked that the disposition of a "large number of complaints pending before the Commission, similar to that in the present case, awaits the outcome of this suit," and continued:

> A practice so generally adopted by manufacturers necessarily affects not only competing manufacturers but the far greater number of retailers to whom they sell, and the consumers to whom the retailers sell. Thus the effects of the device are felt throughout the penny candy

> industry. A practice so widespread and so far-reaching in its consequences is of public concern if in other respects within the purview of the statute (*Federal Trade Commission* v. *Keppel & Brother,* 291 U. S. 304, 309).

Again the Court said:

> The argument that a method used by one competitor is not unfair if others may adopt it without any restriction of competition between them was rejected by this Court in *Federal Trade Commission* v. *Winsted Hosiery Co., supra;* compare *Federal Trade Commission* v. *Algoma Lumber Co., ante,* p. 67. There it was specifically held that a trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss of their trade. A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed (*id.* at p. 312–313).

The doctrines of the *Keppel* case have been adopted by the various Circuits in a great variety of lottery cases under the Federal Trade Commission Act; no Circuit Court having distinguished it in the decision of any case brought before it.

In *Jaffe* v. *Federal Trade Commission,* 139 F. 2d 112 (C. C. A. 7th, 1943), cert. denied March 27, 1944, the Court said:

> We held in the *Koolish* case, *Koolish* v. *Federal Trade Commission,* 7 Cir. 129 F. 2d 64, and reiterate the ruling here, that supplying the means of conducting lotteries in the sale of merchandise is a practice contrary to the established public policy of the United States. It constitutes unfair competition in business and violates Sec. 5 (a) of the Act in question. We specifically hold that proof that sales were made because of such lottery practices is not necessary to support an order under this section (p. 112–113).

B. The doctrine of *stare decisis* as applicable to the promotion in commerce of lotteries

In the first case brought by the Commission to do away with an instance of this evil, an order was issued, in 1918, requiring the respondent in the proceeding to "cease and desist from directly or indirectly giving or offering to give to its customers or prospective customers * * * as an inducement to secure their trade * * * personal property of unequal values, the distribution of which is determined by chance or lot * * *." Matter of *Brumage-Loeb Co.,* 1. F. T. C. 159, 163 (1918). A similar early case is that of Matter of *Everybody's Mercantile Company,* 3 F. T. C. 60, 63 (1920).

There has been no real change or progression in the underlying principle that the promotion of lotteries in commerce is an unfair method of competition and against public policy.

But there has necessarily been some progression in the adaptation of remedies to reach the shifts in prac-

tice of those engaging in the promotion of lotteries in commerce and the efforts of these men to elude the grasp of the statute. Such progressions were contemplated by Congress.

In *Federal Trade Commission* v. *Beech-Nut Packing Company*, 257 U. S. 441 (1922), the Court, speaking of the term "unfair methods of competition," said:

> Congress deemed it better to leave the subject without precise definition and to have each case determined upon its own facts, owing to the multifarious means by which it is sought to effectuate such [unfair] schemes (p. 453).

The Commission was expected to follow these "multifarious means," to extirpate them, and not to be diverted by superficial modifications and pretended improvements.

In *National Candy Co. et al.* v. *Federal Trade Commission*, 104 F. 2d 999, 1005 (C. C. A. 7th, 1939), cert. den. 308 U. S. 610 (1939), the Court considered "the development of plans calculated to evade the intent of the statute, as illustrated by those here presented," and declared this "convinces us that the substitution we made [i. e., in the order of the Commission] in the *McLean* case [i. e., *Federal Trade Commission* v. *A. McLean & Son, et al.*, 84 F. 2d 910, 914] lacks effectiveness in carrying out the intention of Congress." In *Hill* v. *Federal Trade Commission*, 124 F. 2d 104 (C. C. A. 5th, 1941), a lottery case, the Fifth Circuit approved a line of cases as having closed "a loophole for evasion which is certainly closed and no more than closed, by the use of the words in con-

troversy" (106–107). And in *Wolf* v. *Federal Trade Commission,* 135 F. 2d 564, 567 (C. C. A. 7th, 1943), the Court agreed with the Commission that petitioners in that case had invoked a mere "subterfuge" to disguise the lottery character of their scheme.

State courts have often commented upon the ingenuity with which those who seek to profit by developing the gambling instinct of the public attempt to elude State laws against gaming.[2] Indeed "no sooner is a lottery defined * * * than ingenuity is at work to evolve some scheme of evasion which is within the mischief, but not quite within the letter, of the definition." *State* v. *Lipkin,* 169 N. C. 265, 84 S. E. 340, 343 (1915). The constant aim of those who live by promoting gambling schemes is "to streamline the plan with a view of concealing by name and technical operation and other fallacious pretenses one or more of the elements necessary to make it a lottery, gift enterprise, or game of chance." *State* v. *Omaha Motion Picture Exhibitors Assn.,* 139 Neb. 312, 297 N. W. 547, 550 (1941).

> In no field of reprehensible endeavor has the ingenuity of man been more exerted than in the invention of devices to comply with the let-

[2] *Troy Amusement Co.* v. *Attenweiler*, 64 Ohio App. 105, 28 N. E. 2d 207, 213–214 (1940), aff'd 137 Ohio St. 460, 30 N. E. 2d 799 (1940); *Affiliated Enterprises* v. *Waller*, 1 Terry (40 Del.), 28, 5 A. 2d 257, 259 (1939); *Cole* v. *State*, 133 Tex. Cr. R. 548, 112 S. W. 2d 725, 727 (1938); *Iris Amusement Corp.* v. *Kelly*, 366 Ill. 256, 8 N. E. 2d 648, 651 (1937); *Commonwealth* v. *Wall*, 295 Mass. 70, 3 N. E. 2d 28, 30 (1936); *State* v. *Falls Cities Amusement Co.*, 124 Ohio St. 518, 179 N. E. 405, 410 (1931); *People* v. *McPhee*, 139 Mich. 687, 103 N. W. 174, 176 (1905).

> ter, but to do violence to the spirit and thwart the beneficent objects and purposes of the laws designed to suppress the vice of gambling. Be it said to the credit of the expounders of the law that such fruits of inventive genius have been allowed by the courts to accomplish no greater result than that of demonstrating the inaccuracy and insufficiency of some of the old definitions of gambling * * * [*State* v. *Joynt,* 341 Mo. 788, 110 S. W. 2d 737, 740 (1937), following *City of Moberly* v. *Deskin,* 169 Mo. App. 672, 155 S. W. 842, 844 (1943)].

It is not surprising that the Third Circuit, in a lottery case, said:

> This case seems to us a futile continuation of earlier litigation. The trade practices of these petitioners have already been expressly condemned in a unanimous opinion of the United States Supreme Court, *Federal Trade Commission* v. *Keppel & Bro.,* 291 U. S. 304 * * *.
>
> This selling by lottery seems to have prevailed largely where it least should have prevailed, namely in the sale of penny candy to little children [*Minter Bros.* v. *Federal Trade Commission,* 102 F. 2d 69 (C. A. 3d, 1930)].

The court mentioned that in 18 cases the courts had rendered opinions and entered decrees against lottery methods under the Federal Trade Commission Act (ibid). Now there are more than 60 such decrees.

Certainly, we submit "futile continuation" of litigation would be a mild characterization today of the persistent relitigation of the promotion of lottery schemes in commerce, and it is to be regretted that

the doctrine of *stare decisis,* as respects the status of lottery promotion methods under the Federal Trade Commission Act, has not as yet proved persuasive to a substantial part of the promoters of these methods.

C. The scope of the Commission's authority is strictly limited—but the language of the Act prohibiting the use of unfair methods of competition and unfair or deceptive acts or practices in interstate commerce is subject to a broad liberal construction and not confined to fixed and unyielding categories

Relying on the *first Raladam* case and the *Bunte* case as authority petitioners contend that the Commission does not here have jurisdiction; that the holding in the *Winsted* case in reference to furnishing another with a means of violating the law is not applicable here and that the Sixth Circuit's reliance on the *Winsted* case clearly shows that the Court's decision in the *Brewer* case is wrong—from all of which petitioners conclude that applying the rule of strict construction to the words of the statute their acts and practices are not unfair, that they are not using any acts, methods or practices and that the Commision has no jurisdiction to issue the order here involved—all of which is wholly and completely devoid of merit.

We agree with petitioners that the jurisdiction of the Commission is strictly limited to unfair methods of competition and unfair or deceptive acts or practices occurring in interstate commerce and to that extent the Federal Trade Commission Act is subject to the rule of strict construction. However, when jurisdiction has been established the phrases "unfair methods of competition and unfair or deceptive acts

or practices" appearing in the Act are not subject to the rule of strict construction.

In the second *Raladam* case (*Federal Trade Commission* v. *Raladam,* 316 U. S. 149), the Supreme Court speaking through Justice Black at page 152 said:

> One of the objects of the act creating the Federal Trade Commission was to prevent potential injury by stopping unfair methods of competition in their incipiency * * *.

The practices involved in both the first and second *Raladam* cases were all prior to the amendment of the Federal Trade Commission Act, which added the words "unfair or deceptive acts or practices in commerce" to the former phrase in the Act "unfair methods of competition in commerce." This amendment makes it now unnecessary that either competition or effect on competition be shown. *Pep Boys—Manny, Moe & Jack, Inc.* v. *Federal Trade Commission,* 122 F. 2d 158, 161 (C. A. 3, 1941); *Scientific Manufacturing Co.* v. *Federal Trade Commission,* 124 F. 2d 640, 643 (C. A. 3, 1941).

In *Winsted Hosiery Co.* v. *Federal Trade Commission,* 272 Fed. 957 (C. A. 2, 1921), the court held that the use of the labels there involved was in no way connected with unfair competition and the Federal Trade Commission had no power to prohibit their use.

The Supreme Court granted certiorari and pointed out that the lower court's holding was unsound. *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483, 492–493 (1922).

In *Federal Trade Commission* v. *Algoma Lumber Co.,* 291 U. S. 67 (1934) the court by necessary implication rejected the doctrine that the Commission was without authority to prohibit practices "never heretofore regarded" as against the law or public policy. The court said at page 81:

> Competition may be unfair within the meaning of this statute [Federal Trade Commission Act] and within the scope of the discretionary powers conferred on the Commission though the practice condemned does not amount to fraud as understood in courts of law.

Moreover, in *Federal Trade Commission* v. *Keppel & Brother,* 291 U. S. 304, 309–310 (1934) the Supreme Court remarked that Keppel argued "that the [candy lottery] practice [was] beyond the reach of the Commission because it—

> * * * does not fall within any of the classes which this Court has held subject to the Commission's prohibition. See *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 427; *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441, 453; *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 652; *Federal Trade Commission* v. *Royal Milling Co.,* 288 U. S. 212, 217. But we cannot say that the Commission's jurisdiction extends only to those types of practices which happened to be litigated before this Court.
>
> "Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories.

The Supreme Court further pointed out that it was because the common law term "'unfair competition' * * * was deemed too narrow that the broader and more flexible phrase 'unfair methods of competition' was substituted" by Congress and that Congress had discarded the plan of defining "the many and variable unfair practices which prevail in commerce" and had adopted that of "a general declaration condemning unfair practices" and of leaving it "to the Commission" to determine what practices were unfair (*id.*, footnote at pp. 310–311 quoting from Senate Committee Report No. 597, 63 Cong. 2d Sess., p. 13).

Congress, in this Act, was sustained by the Supreme Court in the *Keppel* case. It was held that the result was a substantial delegation of power; and that—

> Congress, in defining the powers of the Commission thus advisedly adopted a phrase which, as this court has said, does not "admit a precise definition but the meaning and application of which must be arrived at by what this court elsewhere has called the gradual process of judicial inclusion and exclusion." *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643.

Again, "Congress deemed it better to leave [the prohibitory powers of the Commission] without precise definition, and to have each case determined upon its own facts, owing to the multifarious means by which it is sought to effectuate such [unfair] schemes." *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441, 453 (1922).

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Under this policy of Congress it is noteworthy that not only is there no specific delegation of power to the Commission to proceed against lottery methods, but there is no specific grant included in the Act to proceed against deceptive sales representations or against methods which eliminate competition or tend to create monopoly. Both the latter lines of activities have so often been held to be within the valid grasp of the Act that citation of cases would be superfluous. They would include several hundred authorities rendered by the Supreme Court and all Circuits.

The *Keppel* case recognized the same power as extending to the unfair promotion of lotteries even though this power likewise was not specifically granted.

The Supreme Court in *Schechter Poultry Corporation* v. *United States,* 295 U. S. 495 (1935), compared the constitutional delegation of powers to the Federal Trade Commission and to the Interstate Commerce Commission with the unconstitutionally attempted delegation through the National Industrial Recovery Act therein in controversy.

The Supreme Court pointed out that the sponsors of the Federal Trade Commission bill had become convinced that the term "unfair competition" as known to the common law was "too narrow" for the ends desired, and that therefore the term "unfair methods of competition" was used in the Federal Trade Commission Act. The Court declared that while the "substituted phrase has a broader meaning" which "does not admit of precise definition," the scope of that term has been "left to judicial de-

termination as controversies arise" (id. at p. 532, citing *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 648, 649 and *Federal Trade Commission* v. *Keppel & Brother,* 291 U. S. 304, 310–312). This determination, the Court pointed out, was to be made "in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest" (id. p. 533, citing several cases, including the *Keppel* and *Algoma* cases, *supra*). The Court then pointed out that Congress had set up the Federal Trade Commission as a quasi-judicial body, to act through formal complaint, notice, hearing, findings of fact, supported by adequate evidence, and order subject to judicial review (ibid.); in contrast with the loose provisions of the Act then at bar.

The Supreme Court in the *Schechter* decision by necessary implication emphasized the opinion that the Federal Trade Commission Act was valid upon grounds distinguishing its grant of power from that attempted by the unconstitutional National Industrial Recovery Act. The opinion was unanimous.

The *Keppel* case, wherein the Supreme Court unanimously upheld the Commission's order against the sale of lotteries in interstate commerce is a controlling basic authority from which the law in reference to the Commission's authority over lotteries has been developed.

In enacting the Federal Trade Commission Act Congress delegated to the Commission jurisdiction which has been validly construed to include power, subject to judicial review, to prevent traders in com-

merce from using methods which compel competitors to lose business—perhaps face failures—unless such competitors stultify themselves by joining, in defiance of the public policy, in promoting the luring of the public into gambling habits. This was held in the *Keppel* case and was approved in the *Schechter* case.

Even if the above were not deemed fully persuasive, there are supporting doctrines of conclusive character. If there were doubt as to the intendment of the Act, its interpretation to include the prohibition of lottery methods of competition soon after organization of the Commission (see 18 orders against lottery methods in 1918, 1 F. T. C. 159, 163) and constant use of this interpretation ever since is entitled to great weight. *Edwards* v. *Darby,* 25 U. S. 207, 209 (1827); *Robertson* v. *Downing,* 127 U. S. 607, 613 (1888); *United States* v. *Healey,* 160 U. S. 136, 141 (1895); *United States* v. *Hermanos,* 209 U. S. 337, 339 (1908); *National Lead Co.* v. *United States,* 252 U. S. 140, 145 (1920).

The presumption is that Congress knew what the Commission was doing about competition through lotteries and what position the courts had taken; and acquiesced therein. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 313 (1933); *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492–493 (1931).

The inference of Congress' acquiescence in administrative construction of a statute is still stronger where the legislative body has reenacted the statutory provision in question without modifying that construction. *Alaska Steamship Company* v. *United States,*

290 U. S. 256, 262 (1933); *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492–493 (1931); *Nagle* v. *Loi Hoa,* 275 U. S. 475, 481–482 (1928); *United States* v. *Hermanos,* 209 U. S. 337, 339 (1908).

Such a legislative construction of Section 5 of the Federal Trade Commission Act is implicit in the law sometimes referred to as the Wheeler-Lea Act, amendatory of the enabling portion, Section 5, of the Federal Trade Commission Act (15 U. S. C. A. Sec. 45; 52 Stat. 111). Thereby Congress broadened, rather than restricted, the scope of said section. It added to the Commission's power to prevent the use of "unfair methods of competition in commerce" a new power, that of preventing the use of "unfair or deceptive acts or practices in commerce." It left the construction which the Commission and the courts placed upon the original section undisturbed, as respects lottery promotion as an unfair method of competition; and thus left it to the discretion of the Commission, subject to review, to decide whether said lottery promotion is also an "unfair practice." That such is its character has been the conclusion of law of the Commission in the instant case and in many lottery cases in which orders have been issued since the Wheeler-Lea Act went into effect. The court in *Wolf* v. *Federal Trade Commission,* 135 F. 2d 564, 567 (1943), cited many authorities, upheld the Commission in holding that the promotion of a lottery scheme was an "unfair practice," and declared that under the said amendatory Act, it is not necessary to show injury to competitors of petitioners (ibid.).

It, therefore, appears to us that counsel for petitioners have made improvident use of the decision in the *Raladam* case, the *Bunte* case, the *Klesner* case, and the other cases cited in their brief in a desperate effort to demonstrate that the Commission does not have jurisdiction over the sale of gambling devices in interstate commerce.

Bearing in mind the above well settled principles of law and the great body of judicial opinion by which such principles were established—showing that the Federal Trade Commission has the power to prohibit the distribution and sale of lottery devices in interstate commerce—we shall now attempt to apply those principles to the specific question here presented.

1. The Federal Trade Commission has jurisdiction to prohibit the sale and distribution in interstate commerce of punch boards and push cards designed and sold for the purpose of enabling others to sell merchandise by means of a game of chance, gift enterprise or lottery

As we have attempted to show the applicable law is well settled. The sale of merchandise by means of a game of chance, gift enterprise or lottery scheme is contrary to the public policy of the United States. Placing in the hands of others the means of engaging in acts and practices which are contrary to public policy is also a violation of the Federal Trade Commission Act.

The Federal Trade Commission has jurisdiction over practices in interstate commerce which are contrary to the public policy of the United States. *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 411, 453 (1922); *Kritzik* v. *Federal Trade Commission,* 125 F. 2d 351, 352 (C. A. 7, 1942);

Ostler v. *Federal Trade Commission,* 106 F. 2d 962, 965 (C. A. 10, 1939), cert. den. 309 U. S. 675 (1940).

As we read petitioners' brief, practically the entire argument and most of the authorities cited and relied upon were cases under the Federal Trade Commission Act prior to its amendment by the Wheeler-Lea Act referring specifically to unfair methods of competition. To the extent that this is true, petitioners' argument is specious. The unfair acts and practices complained of are the sale and distribution in interstate commerce of punch boards and push cards which sale or distribution, supplies to and places in the hands of others the means of engaging in unfair methods of competition and in unfair acts and practices in interstate commerce—that is, the means of distributing merchandise to the public by means of a lottery, gift enterprise or game of chance.

Section 5 of the Federal Trade Commission Act as amended (52 Stat. 111; 15 U. S. C. 45) directs the Commission to prevent persons, partnerships, or corporations "from using unfair methods of competition in [interstate] commerce and unfair or deceptive acts or practices in [interstate] commerce." In so far as the issues here raised are concerned, the complaint (Tr. R. pp. 3–15) charges only that in the sale of punch boards and push cards petitioners are engaged in unfair acts and practices in interstate commerce. There is no charge or finding of unfair methods of competition or of deceptive acts or practices in interstate commerce.

The Commission pleaded and found that the act prohibited by the order to cease and desist—the sell-

ing and distributing of lottery devices—was in interstate commerce. There is no dispute as to this. It cannot be doubted, therefore, that the acts and practices complained of and prohibited by the order occured in interstate commerce, whether they were "unfair" acts and practices or not. The sole question before this court is whether these acts and practices as committed by petitioners in interstate commerce were "unfair" within the meaning of the Federal Trade Commission Act. More simply the question is whether it is contrary to the public policy of the United States to sell lottery devices in interstate commerce when such devices are designed and sold to be used in the sale of merchandise by means of a game of chance, gift enterprise or lottery.

When the vendee of petitioners' punch boards and push cards is a dealer in interstate commerce, petitioners' acts and practices—the sales of the lottery devices—clearly place in these hands the means of selling merchandise in interstate commerce by means of a lottery device. It is well settled that such sales by petitioners' vendees are contrary to public policy and may be enjoined by the Federal Trade Commission.[3] If the purchaser of petitioners' product is a

[3] *Lee Boyer's Candy* v. *Federal Trade Commission*, 128 F. 2d 261 (C. A. 9, 1942); *Helen Ardelle* v. *Federal Trade Commission*, 101 F. 2d 718, 719 (C. A. 9, 1939); *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 314 (1934); *Deer* v. *Federal Trade Commission*, 152 F. 2d 65 (C. A. 2, 1945); *Loughran* v. *Federal Trade Commission*, 143 F. 2d 431, 434 (C. A. 8, 1944); *Wolf* v. *Federal Trade Commission*, 135 F. 2d 564, 568 (C. A. 7, 1943); *Koolish* v. *Federal Trade Commission*, 129 F. 2d 64, 65 (C. A. 7, 1942), cert. den. 317 U. S. 683 (1942); *Hill* v. *Federal Trade Commission*, 124 F. 2d 104, 106 (C. A. 5, 1941); *Ostler*

local dealer who sells merchandise only in intrastate commerce, petitioners place in the hands of such dealers the means of selling merchandise by a game of chance, gift enterprise or lottery. There can be no doubt, therefore, that petitioners, acting in interstate commerce, not only violate the Federal Trade Commission Act but place in the hands of their customers and supply their customers with a means of violating the Federal Trade Commission Act. It is likewise well settled that to supply another with the means of violating the Federal Trade Commission Act is in itself a violation of the Act. *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483, 494 (1922); *Ohio Leather Co.* v. *Federal Trade Commission,* 45 F. 2d 39, 41 (C. A. 6, 1930); *Perloff* v. *Federal Trade Commission,* 150 F. 2d 757, 759–760 (C. A. 3, 1945); *Irwin* v. *Federal Trade Commission,* 143 F. 2d 316, 325 (C. A. 8, 1944); *Herzfeld* v. *Federal Trade Commission,* 140 F. 2d 207, 208 (C. A. 2, 1944) *Marietta Manufacturing Co.* v. *Federal Trade Commission,* 50 F. 2d 641, 642 (C. A. 7, 1931); *Masland Dura Leather Co.* v. *Federal Trade Commission,* 34 F. 2d 733, 736–737 (C. A. 3, 1929).

This principle has repeatedly been applied to cases in which the means supplied was a lottery device. *Deer* v. *Federal Trade Commission,* 152 F. 2d 65, 66 (C. A. 2, 1945); *Chas. A. Brewer & Sons* v. *Federal Trade Commission,* 158 F. 2d 74 (C. A. 6, 1946); *Modernistic Candies, Inc.* v. *Federal Trade Commis-*

Candy Co. v. *Federal Trade Commission*, 106 F. 2d 962, 965 (C. A. 10, 1939), cert. den. 309 U. S. 675 (1940); *Minter* v. *Federal Trade Commission*, 102 F. 2d 69, 70 (C. A. 3, 1939).

sion, 145 F. 2d 454, 455 (C. A. 7, 1944); *Jaffe* v. *Federal Trade Commission,* 139 F. 2d 112 (C. A. 7, 1943), cert. den. 321 U. S. 791 (1944); *Koolish* v. *Federal Trade Commission,* 129 F. 2d 64, 65 (C. A. 7, 1942), cert. den. 317 U. S. 683 (1942); *Bunte Bros.* v. *Federal Trade Commission,* 104 F. 2d 996, 999 (C. A. 7, 1939); *Chicago Silk Co.* v. *Federal Trade Commission,* 90 F. 2d 689, 691 (C. A. 7, 1937); *Federal Trade Commission* v. *F. A. Martoccio Co.,* 87 F. 2d 561, 565 (C. A. 8, 1937), cert. den. 301 U. S. 691 (1937). In the *Jaffe* case it was specifically held that it was not necessary to prove that sales were made with the device supplied. In the *Deer* case, speaking of lottery devices which petitioners in that case supplied to the customers upon request, the court said:

> * * * it was not necessary to prove that the petitioners actually participated in the operation of the bingo game or club plan conducted by their customers; it is enough that they aided and abetted in such methods of resale.

In all of the lottery cases cited above, except the *Modernistic* and *Brewer* cases, merchandise of some kind was provided by the various respondents which might be sold and in some cases was sold with the devices supplied. In the instant case petitioners supply nothing insofar as the issue here raised is concerned except lottery devices. That is to say, they do not supply the merchandise or prizes. This is a distinction without a difference, however, for the evil sought to be prohibited is the sale of goods by means of a lottery, not the sale of goods of any particular

person or dealer. Once the lottery device is supplied the possibility of selling goods by its use is present. The Circuit Court of Appeals for the Seventh Circuit clearly recognized this fact in *Modernistic Candies* v. *Federal Trade Commission,* 145 F. 2d 454, 455 (C. A. 7, 1944).

2. Petitioners' objections to the jurisdiction of the Commission to issue the order herein are untenable and the authorities relied upon lend it no support

Petitioners not only contend (br. pp. 11–16) that their acts are not unfair acts or practices within the intent and meaning of the Federal Trade Commission Act, because all competitors are engaged in the same practice, but they actually contend that they are not engaged in using any acts, methods, or practices in interstate commerce. The contention that the sale of punch boards or push cards in interstate commerce is not an unfair act and practice within the intent and meaning of the Federal Trade Commission Act is wholly devoid of merit and can find no support in the authorities as we have above fully demonstrated. Their contention that they are not using any acts, methods, or practices in interstate commerce is too frivolous to justify a reply.

(a) The case of *Scientific Manufacturing Co.* v. *Federal Trade Commission*, 124 F. 2d 640 (C. A. 3, 1941) is not applicable to the question here raised

Petitioners rely strongly (br. pp. 16–19) upon the *Scientific* case in support of their contention that the Federal Trade Commission has no jurisdiction in the instant matter because their acts and practices do not affect the trade in which they are engaged. This con-

tention is likewise devoid of any merit, for the *Scientific* case is easily distinguishable from the instant matter, and the decision of the Third Circuit, whether correct or incorrect, has no bearing on the issues raised. As a matter of fact, the Third Circuit itself has in a subsequent decision used language which indicates that it would not now follow the *Scientific* case on the issues here raised by petitioners. See *Perloff* v. *Federal Trade Commission,* 150 F. 2d 757 (C. A. 3, 1945) where at page 759, speaking through Circuit Judge McLaughlin, the court said: "The jurisdiction of the Commission in cases of unfair trading is recognized, regardless of whether it is the public in general, or a particular class of competitors, whose interest demands the suppression of the practice complained of." In addition to this the Circuit Courts of Appeals for the Sixth and Seventh Circuits have refused to follow the Third Circuit's decision in the *Scientific* case.

Petitioner in the *Scientific* case sold pamphlets in which he expressed his honest but erroneous opinion as to the dangers involved in the use of aluminum cooking utensils. He dealt in opinions and nothing else and sold these opinions to anyone who would buy them. Some of his pamphlets came into the hands of manufacturers and distributors of nonaluminum cooking utensils. The Commission made no finding in that case that the pamphlets were sold or placed with the manufacturers and distributors of nonaluminum cooking utensils to be used in the sale of such goods. In fact, the Commission found that the petitioner was engaged in writing and distributing

pamphlets "for sale and distribution to the public", 32 F. T. C. 493, 499 (1941), thus negativing the idea that petitioner was in the business of placing unfair methods of competition in the hands of others.

From the facts in the *Scientific* case it was clear that petitioner was not connected in any way with the cooking utensil business; had no connection with any unfair use of his pamphlets by the cooking utensil industry. There is no public policy against the expression of an honest opinion by anyone. If some take advantage of such an expression, though the opinion may be erroneous, for the purpose of committing a fraud, there is no authority which says that the author of the opinion is *particeps criminis*. It was on the fact that petitioner in the *Scientific* case was in no way connected with any business except that of selling pamphlets that the decision was rendered. The court held that the Commission could not restrain an unfair act in interstate commerce unless that act, in addition to being unfair and in interstate commerce, affected the trade in which it was perpetrated (124 F. 2d 640, 644). It, therefore, necessarily follows that if petitioners in the instant matter are engaged in a trade affected by their sale and distribution of punch boards and push cards in interstate commerce, the *Scientific* case is inapposite.

The instant matter is easily distinguishable from the *Scientific* case and presents an entirely different set of facts. The unfair act prohibited here is the sale and distribution of gambling devices "which are to be used or may be used in the sale and distribution of merchandise to the public by means of a game of

chance, gift enterprise or lottery scheme." Unlike the pamphlets in the *Scientific* case, petitioners' gambling devices are not sold to the public at large but to "manufacturers of various other articles of merchandise and to both wholesale and retail dealers in other merchandise" who use the device in selling merchandise by means of lottery to the public. This is the specific purpose for which petitoners sell their gambling devices to others.

In selling their punch boards and push cards to manufacturers and dealers, petitioners are *particeps criminis* "a criminal partner to gamblers." *Maltz* v. *Sax,* 134 F. 2d 2, 5 (C. A. 7, 1943), cert. den. 319 U. S. 772 (1943); *Modernistic Candies, Inc.* v. *Federal Trade Commission,* 145 F. 2d 454, 455 (C. A. 7, 1944); cf. *Deer* v. *Federal Trade Commission,* 152 F. 2d 65 (C. A. 2, 1945).

The sale of punch boards and push cards is so intimately connected with the sale of merchandise by means of these devices as to be inseparable therefrom. *George* v. *Wm. C. Johnson Candy Co.,* 19 Ohio App. 137, 146 (1924). It, therefore, is clear that legally petitioners are engaged in the sale of merchandise by means of lottery devices. Their business consists of selling gambling devices and merchandise, and both operations are part of one trade. Petitioners' business, consisting of selling gambling devices, is as dependent upon the sale of merchandise by means of such devices as the sale of merchandise is dependent upon the supplying of the gambling devices. Petitioners' business would collapse if their punch boards

and push cards were not used in the sale of merchandise. These are not two separate businesses, but one business consisting of two inseparably intertwined parts. The rule of *particeps criminis* applicable to petitioners should not be relaxed since the only effect of such a relaxation would be to allow petitioners to continue to violate the law and public policy, state and national. We submit, therefore, that petitioners' acts in selling punch boards and push cards in interstate commerce legally does affect the trade in which petitioners are engaged.

Further than this the *Scientific* case holds that it is sufficient if the industry is affected and if the injury is to the public. The Sixth Circuit thought the *Scientific* case could be distinguished on other grounds and, if not, refused to follow it. *Chas. A. Brewer & Sons* v. *Federal Trade Commission,* 158 F. 2d 74 (C. A. 6, 1946). In enacting the Wheeler-Lea amendment Congress only required that the act be committed in interstate commerce and that it be unfair before such act could be declared unlawful. Congress did not say that the unfairness must be to any industry—the unfairness referred to in the Act is not limited nor restricted. The primary purpose of the Federal Trade Commission Act prior to the Wheeler-Lea amendment and subsequent thereto has always been the protection of the public. Public interest may exist although the practice deemed unfair does not violate any private right. This is well established. *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, 27 (1929); *Gimbel Bros.* v. *Federal*

Trade Commission, 116 F. 2d 578, 579 (C. A. 2, 1941); *Gulf Oil Corporation* v. *Federal Trade Commission,* 151 F. 2d 106, 108 (C. A. 5, 1945); cf. *Royal Baking Powder Co.* v. *Federal Trade Commission,* 281 F. 2d 744, 752 (1922). It is only necessary to show that there is an act in interstate commerce inimical to the public interest, *Progress Tailoring Co.* v. *Federal Trade Commission,* 153 F. 2d 103, 105 (C. A. 7, 1946).

(b) *Modernistic Candies, Inc., et al.* v. *Federal Trade Commission*, 145 F. 2d 454 (C. A. 7, 1944) and *Chas A. Brewer & Sons* v. *Federal Trade Commission*, 158 F. 2d 74 (C. A. 6, 1946) are squarely in point and should be followed by this court

Petitioners' analysis of the *Modernistic* case (br. pp. 27–30) is based upon a position that is untenable. They frankly tell the court that it is of vital importance to the correctness of their analysis that the court believe that *Modernistic* was engaged in the business of selling chewing gum. It follows, therefore, if *Modernistic* was not engaged in the business of selling chewing gum petitioners' analysis, argument, and conclusion fall apart.

The device which *Modernistic* supplied was a punch board of the exact type which petitioners supply, except that instead of paper being inserted in the pockets or holes *Modernistic* inserted balls of gum. Twenty or twenty-four of these balls of gum were of a different color from the other balls. If the customer punched out one of the twenty or twenty-four off-color balls he received a prize of some kind, usually a stick of candy or a candy bar. It was the merchant and not *Modernistic* who supplied the prizes.

Petitioners' analysis of this case attempts to avoid the impact of the court's decision. Petitioners claim that *Modernistic* was engaged in the business of selling gum. This is not correct and is squarely in the face of the Sixth Circuit's opinion holding to the contrary. The court treated the gum balls as a mere subterfuge, saying that the purpose of the board was *not* to sell gum. The decision, therefore, was rendered on the basis of the facts identical to those in the instant matter.

In deciding the *Modernistic* case the court stated the question presented as follows:

> The *Keppel* case, however, does not cover the case involved because the articles sold here, The Ball Gum Board, is incomplete in itself as a game of chance. No prizes are provided. The board, however, is designed, intended and conducive to gambling; its use suggests, and was intended to encourage, gambling. Our question then is whether such a method of merchandising is an unfair trade practice contrary to public policy and within the power of the Federal Trade Commission to prohibit by use of a cease and desist order where the article sold is not complete in itself for merchandising by means of a game of chance, but is so devised, planned and constructed as to encourage and induce its use for that purpose [Opinion, p. 455].

The court then held squarely that the mere supplying of the board without other merchandise was a violation of the Federal Trade Commission Act, saying that the device was too apparently allied with the

purpose of merchandising by gambling to appeal to a court as being a fair trade practice [Opinion, p. 455].

> It is clear that the Federal Trade Commission has the power to eradicate merchandising by gambling in interstate commerce. We think the Commission also has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandising by gambling. The gamblers and those who deliberately and designedly aid and abet them are both engaged in practices contrary to public policy. Merchandising by gambling should not be divided into insulated acts, which appear innocent when examined separately. This unfair practice should be viewed as a whole.

This is the *ratio decendi* of the *Modernistic* case. The court continued by saying:

> If the Federal Trade Commission is to police merchandising by gambling, it must police those who designedly and deliberately aid and abet this practice.

Petitioners claim that this is dictum, but whether this last statement is dictum or not the reasoning is very cogent.

If the Commission is to stop the merchandising by lottery, it is important to *arrest the evil at its source* rather than institute separate proceedings against each of the users of the millions of punch boards and push cards which petitioners manufacture yearly. Proceedings against the manufacturers and distributors of punch boards and push cards is the only possible logical procedure for the Commission to

pursue to arrest the evil here involved—petitioners' contention to the contrary notwithstanding (Pet.'s br. pp. 41–47).

Petitioners also analyze and criticize the decision of the Sixth Circuit in *Chas. A. Brewer & Sons* v. *Federal Trade Commission,* 158 F. 2d 74 (C. A. 6, 1946), (br. pp. 19–24) including in this analysis a discussion of the various citations of authority appearing in the court's opinion. Petitioners come up with the conclusion that the Sixth Circuit was clearly wrong and that petitioners' analysis is obviously correct. There is no merit to this contention for several reasons.

In the *Brewer* case the Sixth Circuit followed the decision of the Seventh Circuit in the *Modernistic* case. In the *Brewer* case, no merchandise even in the form of subterfuge chewing gum appeared. Petitioners in that case just as in the instant matter sold punch boards and push cards without prizes or other merchandise. In the *Brewer* case as in the instant case the Commission found that the sales in interstate commerce were made to persons who make up assortments; that retail dealers used the device to sell merchandise to the public; that these intrastate sales violated the public policy of the United States; and that the respondents violated the Federal Trade Commission Act by the mere supplying of the devices. The Sixth Circuit affirmed the Commission's order holding unqualifiedly that the Commission may ban the sale of the devices alone.

Congress has given its unqualified approval to the decision of the Circuit Court in the *Brewer* case as

well as in the *Keppel* case. Public Law 906—81st Cong. (S. 3357), approved January 2, 1951, forbids the transportation of slot machines suitable for gambling in interstate commerce. Section 2 of the Act provides, however, that shipments may be made to any state which has enacted a law exempting that state from the provisions of the Act (Public Law 902—81st Cong.). Section 2 of the Act then provides:

> Nothing in this Act shall be construed to interfere with or reduce the authority or existing interpretations of the authority, of the Federal Trade Commission under the Federal Trade Commission Act as amended (15 U. S. C. 41–58).[5]

The Act, therefore, shows that in the case of punch boards and push cards it is contrary to the public policy of the United States to permit their shipment in interstate commerce even to points where their use is legal.

That this is the meaning of the Act is clearly indicated by the report of the Senate Committee on Interstate and Foreign Commerce (Senate Report No. 1482, 81st Cong. 2d sess., p. 4) where in a discussion

[5] "The long time failure of Congress to act after it had been judicially construed, and enactment by Congress of legislation which implicitly recognized the judicial construction as defective, is persuasive of legislative recommendation that the judicial construction is the correct one. This is the more so where * * * after the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the Statute." *Apex Hosiery Co.* v. *Leader et al.*, 310 U. S. 469, 488 (1910).

of the above-quoted excerpt from the bill relating to the Federal Trade Commission, it is said:

> A saving clause is included in this section to avoid any misunderstanding that the Act, and particularly the proviso in Section 2 permitting unbroken transportation of gambling devices into States where their use is legal, interferes with or reduces the authority which the Federal Trade Commission has exerted under Section 5 of its constituent Act (15 U. S. C. 45) to exclude from the channels of interstate commerce devices to be used in the sale or distribution of merchandise to the public, *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.,* 291 U. S. 4; *Charles A. Brewer & Sons* v. *Federal Trade Commission,* 158 F. 2d 74.

The citations to the *Keppel* and the *Brewer* cases are part of the above quotation.

The policy in regard to gambling devices such as punch boards or push cards to be used in the sale or distribution of merchandise is thus shown to be different in this respect from the public policy in regard to devices such as slot machines which are used to gamble for money. The reason for this distinction is apparent. Slot machines could be used as a method of selling merchandise by means of a gambling device, but generally they are not so used. Punch boards and push cards are always so used and have no other purpose. The principal effect of the use of the slot machine is local. The punch boards and push cards, however, always may, and generally do cause

a diversion of trade in interstate commerce as well as in intrastate commerce. Congress is responsible for the protection of interstate commerce. It has no such responsibility in relation to intrastate gambling. It is thus seen to be the public policy of the United States not to permit the shipment in interstate commerce to any State of gambling devices customarily or ordinarily used in the sale or distribution of merchandise to the public, even if the use of the device is legal within the boundaries of the state of its destination.

The report of the House Committee on Interstate and Foreign Commerce on the same Bill (S. 3357) makes this policy doubly certain:

> Section 2 further provides that nothing in this Act shall be construed to interfere with or reduce the authority of the Federal Trade Commission under the Federal Trade Commission Act as amended. It is the purpose of this provision to leave unaffected the powers of the Federal Trade Commission with respect to the use of lotteries, games of chance, or other gambling devices for the purpose of merchandising. Such use has been held to be an unfair trade practice in violation of the Federal Trade Commission Act as amended [Report No. 2769, 81st Cong. 2d Sess. pp. 9–10].

We might here notice petitioners' reference to and reliance on *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349 (1941) in support of its contention that the Federal Trade Commission has no jurisdiction in the instant matter for the reason that it has no jurisdiction of intrastate commerce.

Since the decision in the *Bunte* case the Commission has not attempted to exercise jurisdiction over intrastate acts. The Commission has strictly followed the court's decision in that case and has refrained from issuing any complaints involving acts occurring wholly in intrastate commerce—even though such acts materially affected interstate commerce.

In the instant matter the Commission does not attempt to control nor does its order attempt to control any intrastate act. The order plainly, unequivocally and simply prohibits petitioners from selling their gambling devices in interstate commerce. Under this order petitioners can sell to their hearts' content wholly in intrastate commerce. Undoubtedly the order here will have an effect on intrastate commerce, since it will affect the intrastate sale of merchandise by means of lotteries. Just as the court, in the *Bunte* case, held that the mere fact that intrastate sales may affect interstate commerce did not give the Commission jurisdiction over such intrastate sales, by the same token the mere fact that the Commission's control over interstate sales may affect intrastate sales does not prevent the Commission from exercising the jurisdiction conferred upon it by the statute. The Commission's jurisdiction over interstate acts is not, however hopeful petitioners may be, ousted by the fact that the exercise of the power granted it by Congress over interstate sales may either directly or indirectly affect intrastate commerce. The *Bunte* case is not relevant to the issue here since petitioners' unlawful activities occur wholly in interstate com-

merce. Further than this, Congress has given the Federal Trade Commission power to regulate interstate commerce within the limited scope of the Act "It is no objection to the exertion of the power to regulate commerce that its exercise is attended by the same incidents which attend the exercise of the policy power of the States." *United States* v. *Darby,* 312 U. S. 100, 114 (1941). The *Bunte* case does not hold, and we find no case holding, that the Commission has no jurisdiction over acts in interstate commerce merely because such jurisdiction may affect intrastate commerce.

In view of the above, it is obvious that petitioners' interpretation of the *Scientific* case is in conflict with the facts of the decision of the Circuit Court of Appeals for the Seventh Circuit in the *Modernistic* case and with the decision of the Sixth Circuit in the *Brewer* case. Where the Circuit Courts are in disagreement we deem it proper to urge that if this court's decision is to be based on precedent, the court should follow that authority which enables the Commission to prohibit the violation of public policy involved in the sale and distribution of gambling devices in interstate commerce. Otherwise the Commission can never check the evil at its source and, therefore, can arrest the practice only from time to time in a most ineffective manner.

(c) Petitioner's arguments as to the lottery features not being part of their interstate commerce do not help them

Petitioners seem to contend that the sale of punch boards and push cards in interstate commerce as here

involved is not sale of merchandise by lottery; that the lottery method occurs in sales made in intrastate commerce over which, under the Supreme Court decision in the *Bunte* case says the Commission has no jurisdiction and therefore the public policy referred to and relied upon by the Sixth Circuit in the *Brewer* case has no application or bearing on the question here presented. This is completely devoid of either substance or merit.

It is true that the final sale to the ultimate purchaser by means of lottery of necessity, always occurs in intrastate commerce and is an intrastate transaction. The punching of the board or pushing of the card always occurs within the borders of some state. This was true in all of the lottery cases we have hereinabove cited in which the courts have held that the Federal Trade Commission had jurisdiction. Although the Commission in those cases did not prohibit the final punching of the board or pulling of the tab the Commission's order undoubtedly accomplishes that result and prevented the final intrastate sale when it prohibited the supplying of the devices and the merchandise in interstate commerce. It is petitioners who lay the foundation for these lotteries by selling their punch boards and push cards in interstate commerce.

It is also very significant that the sale of merchandise itself in interstate commerce—in so far as the record of the cited lottery cases here show—was not unlawful. The "THING" in all of those cases which made the transaction unlawful was the lottery devices. Remove lottery devices from those transactions and in

so far as the records show there was no illegal act committed. Remove the merchandise from those transactions and the "THING" remains. It is the "THING" that caused the act to be unlawful—not the merchandise—the sale and distribution in interstate commerce of punch boards and push cards to be used and designed to be used for the sale of merchandise to the purchasing public by means of a lottery scheme.

The same defense argument was offered in *Federal Trade Commission* v. *F. A. Martoccio Co.,* 87 F. 2d 561 (C. A. 8, 1937). The court held in that case that such an argument was met by the language of *Federal Trade Commisison* v. *Winsted Hosiery Co.,* 258 U. S. 483, 494, where the court held that a person is a wrongdoer who furnished another with a means of violating the Federal Trade Commission Act; and in *Chicago Silk Co.* v. *Federal Trade Commission,* 90 F. 2d 689, 691 (C. A. 7, 1937), cert. den. 302 U. S. 753 (1937), the court also held that there was no merit to such contention as petitioners originated and set in operation the scheme or device in question.

A similar case is *Koolish* v. *Federal Trade Commission,* 129 F. 2d 64, 65 (C. A. 7, 1942), cert. den. 317 U. S. 683 (1942), and in *Maltz* v. *Sax,* 134 F. 2d 2, 5 (C. A. 7, 1943), cert. den. 319 U. S. 772 (1943) in which it was held that to distinguish between the business of gambling and that of making the machine would be too great a "refinement" and that most courts have refused to make such a distinction. The

court held in the *Maltz* case that in seeking damages under the Sherman Act plaintiff did not come into court with clean hands and said "therefore, though his making and sale of punch boards may not be gambling, his status is fixed by his inseparable connection with the gambling business, and he will be left where he placed himself—not entitled to judicial assistance" (134 F. 2d at 5).

For these reasons we therefore respectfully submit that petitioners' contention under this phase of their argument is as specious as the other phases hereinabove noted.

(d) The order is not too broad and the relief afforded the public is correct and should be affirmed and enforced

Petitioners, relying on this Court's decision in *Lee Boyer's Candy* v. *Federal Trade Commission,* 128 F. 2d 261, contend that the phrase "or may be used" should be stricken from the order (br. p. 31). Again petitioners' argument is devoid of substance and the authorities relied upon give it no dignity.

In the *Lee Boyer's* case, the court held that since candy could and might be sold separate from the lottery devices, the order should be limited to the actual sale of packaged goods accompanied by such devices. Obviously this case is not in point. Petitioners here sell only lottery devices. Their devices not only "may be used" but the only purpose for which they are used and for which they are sold by petitioners, is to sell merchandise by means of a lottery device.

Further than this the determination of the type of order necessary to protect the public from business practices similar to those of petitioners rests within the sound discretion of the Commission and the courts will not disturb the Commission's orders unless they exceed the scope of the complaint or are on their face an abuse of discretion. The Supreme Court has frequently emphasized "the scope that must be allowed to the discretion and informed judgment of an expert administrative body." *Federal Security Administrator* v. *Quaker Oats Co.,* 318 U. S. 218, 227–228 (1943). The Supreme Court has also declared that the Federal Trade Commission was created with the "avowed purpose of lodging the administrative functions committed to it" in a body of experts "specially competent to deal with them." *Federal Trade Commission* v. *Keppel & Brothers,* 291 U. S. 304, 314 (1934); *Humphrey's Executor* v. *United States,* 295 U. S. 602, 621, 625 (1935). It is "not the province of the court to absorb the administrative functions to such extent that the executive or legislative agencies become mere fact-finding bodies." *Gray* v. *Powell,* 314 U. S. 402, 412 (1941). The Supreme Court has also said that in determining the propriety of a Federal Trade Commission order, great weight is given to the Commission's conclusions as being the result of an expertness coming from experience. In view of the Commission's familiarity with the problem before it, the courts should not lightly modify the Commission's order made in efforts

to safeguard a competitive economy. *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683 (1948), rehearing denied (1948).

In proceedings of this nature, the power of the courts is not administrative but judicial, and "the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable," and "judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 139–140, 146 (1939); *Dobson* v. *Commissioner of Internal Revenue,* 320 U. S. 489, 501 (1943).

The "relation of remedy to policy," the Supreme Court has declared, "is peculiarly a matter for administrative competence" (*Phelps-Dodge Corp* v. *National Labor Relations Board,* 313 U. S. 177), and the courts will neither "substitute their own judgment" for that of an administrative agency, *Federal Security Administrator* v. *Quaker Oats Co.,* 318 U. S. 218, 227 (1943), nor undertake to advise an agency "how to discharge its functions." *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 617–618 (1944).

(e) The Commission's proceeding against petitioners is in the public interest

Without citing any authority whatever except a reference to the *Raladam* case, petitioners contend

(br. pp. 31–37) that the proceeding here is not in the public interest because the proceeding is not a direct proceeding against the sellers of merchandise in intrastate commerce by the use of their devices. There is no merit to this, and we shall not attempt a detailed reply of petitioners' contentions here.

More than 300 orders have been issued by the Commission requiring respondents to cease and desist from lottery methods in commerce. See Code of Federal Regulations of the United States—as enforced June 1, 1938—Title 16, Section 3.99, pp. 718–720; together with subsequent annual supplements of the same title and section. Of these, about 60 have been carried to the Circuit Courts of Appeals. Not one of these orders has been set aside on the merits.

The magnitude of the public interest adverse to lotteries may be understood from the diversity of the merchandise into which this insidious vice has crept.

That appeals to the public through lottery methods endanger many lines becomes evident upon mere casual inspection of the lottery cases in many recent volumes of the Federal Trade Commission and court reports. These cases show that this insidious method of selling includes ice cream cones, ice cream cup trade, blankets, clocks, tableware, kitchenware, luggage, fishing tackle, lamps, electric fixtures and numerous household articles, glassware, pen and pencil sets, radio, food mixers, electric appliances, cigarette lighters, silverwise, manicure sets, wallets, pictures, chinaware, cameras, dolls and cosmetic preparations, and in some instances, men's wearing apparel.

Bearing in mind the contagious gambling character of chance offering in selling, the efforts of the Commission and the courts to put a stop to the sale of merchandise by gambling methods take on important significance.

The strong language of the Supreme Court, in *Phelan* v. *Virginia,* 49 U. S. 163 (1850), as to the "pestilence" of lotteries which "enters every dwelling * * * reaches every class * * * and preys upon" and "plunders the ignorant and simple" applies with force many times multiplied to the spread of lottery methods into line after line of merchandise.

It is well settled that in "determining whether a proceeding is in the public interest, the Commission exercises a broad discretion," *Ford Motor Company* v. *Federal Trade Commission,* 120 F. 2d 175, 182 (C. A. 6, 1941), cert. den. 314 U. S. 668 (1941), and if a "practice is unfair within the meaning of the Act, it is equally clear that [a proceeding] aimed at suppressing it, is brought as § 5 of the Act requires, 'to the interest of the public'." *Federal Trade Commission* v. *Keppel & Brother,* 291 U. S. 304, 308 (1934); *E. D. Muller & Co.* v. *Federal Trade Commission,* 142 F. 2d 511, 520 (C. A. 6, 1944). It has been held, as we have hereinabove indicated in legions of cases involving sale by means of lotteries that such sales are in violation of the Federal Trade Commission Act and against an established policy of the United States Government and is a practice which the public has a definite and substantial interest in preventing.

We, therefore, submit that there can be no question or doubt as to the existence and cogency of the public interest which supports the order of the Commission herein and that all courts which have passed upon lottery cases have found the public interest supporting this class of cases to be not only sufficient but more than ample.

IV. CONCLUSION

We respectfully submit, therefore, that the Commission's authority to ban the shipments of punch boards and push cards without merchandise in interstate commerce is shown by (1) a long list of decisions which hold that sale of merchandise by means of games of chance, gift enterprises or lottery is against the established policy of the Government of the United States; (2) the reasoning of all decisions of the United States Supreme Court and the United States Courts of Appeals dealing with the power of the Commission to ban the sale of such devices together with the merchandise; (3) the direct holding of the Seventh Circuit and the Sixth Circuit in the *Modernistic* and *Brewer* cases respectively; and (4) by the enactment of Public Law No. 906, 81st Congress.

The Commission's order, therefore, is supported by the findings and is valid in law.

The Commission, therefore, prays that the petition to review be dismissed and that pursuant to the statute [6] the Court enter its decree affirming the Com-

[6] "To the extent that the order of the Commission is affirmed, the Court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, § 5 (c); 52 Stat. 113; 15 U. S. C. § 45 (c).

mission's order and commanding petitioners to obey and comply therewith.

Respectfully submitted.

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